COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2999 **Cir. Ct. No. 00-CV-162**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DAVID FANELLO, SR. AND SHELLY WEETH,

PLAINTIFFS-APPELLANTS,

V.

RALPH WEISENBERGER AND COUNTY OF TREMPEALEAU,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Fanello and Shelly Weeth appeal a summary judgment dismissing their negligence action against Trempealeau County and

Sheriff Ralph Weisenberger. The trial court concluded that the County and sheriff are immune from suit under WIS. STAT. § 893.80(4). Fanello and Weeth argue that the County coroner's and sheriff's negligent failure to find a portion of their son's skull that was left near the scene of an accident falls within two exceptions to the immunity rule: (1) known and compelling danger and (2) nongovernmental, medical decisions. We reject these arguments and affirm the judgment.

¶2 Fanello's and Weeth's son died from massive head trauma when he was ejected from a car in a nighttime rollover accident. The coroner removed his body from the scene on the night of the accident. Three days later, Fanello inspected the scene and found what he believed to be a portion of his son's skull in ankle-deep grass two feet off the road surface. It was later given to the funeral director and cremated with his son's body. Fanello and Weeth claim emotional distress from the coroner's and sheriff's failure to find and transport that piece of skull.

¶3 WISCONSIN STAT. § 893.08(4) prohibits lawsuits against governmental subdivisions or their officers, agents or employees for discretionary, nonministerial acts. *See* ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 288, 531 N.W.2d 357 (Ct. App. 1995). A government employee's duty is considered ministerial rather than discretionary when it is "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." *See* ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 91, 596 N.W.2d 417 (1999).

¶4 Wisconsin courts have recognized four exceptions to the governmental immunity doctrine, two of which are argued in this case. The

County and its employees are not immune if they fail to eliminate or warn of a "compelling and known danger" such as the failure to warn hikers that a trail came within inches of a ninety-foot gorge. *See* ***Cords v. Anderson***, 80 Wis. 2d 525, 538, 269 N.W.2d 672 (1977). In addition, governmental immunity does not apply to government employees performing medical, nongovernmental functions such as an autopsy. *See* ***Scarpaci v. Milwaukee Cty.***, 96 Wis. 2d 663, 685, 292 N.W.2d 816 (1980).

¶5 The trial court correctly concluded that the County and the sheriff are immune from liability under WIS. STAT. § 893.80(4). The degree to which they must clean up an accident site and recover body fragments are discretionary acts. No law or rule defines the sheriff's or coroner's duties with such certainty that nothing remains for judgment or discretion.

¶6 The sheriff's and coroner's alleged negligence does not fall within the ***Cords*** exception for compelling and known danger. While failure to locate all body parts at the scene of a fatal accident might well result in trauma to next of kin who later find a body part, the nature, degree and likelihood of injuring others does not compare to the dangers presented in ***Cords*** or other cases in which uniquely dangerous conditions were fully appreciated only by government officials who had notice of them and failed to safeguard the general public. *See, e.g.*, ***Lodl v. Progressive N. Ins. Co.***, 2001 WI App 3, ¶2, 240 Wis. 2d 652, 625 N.W.2d 60; ***Domino v. Walworth County***, 118 Wis. 2d 488, 37 N.W.2d 917 (1984).

¶7 The coroner's alleged negligence does not fit within the ***Scarpaci*** exception for medical, nongovernmental acts. *See* ***Willow Creek Ranch v. Town of Shelby***, 2000 WI 56, ¶26, 235 Wis. 2d 409, 611 N.W.2d 693. A coroner is not

required to be a medical person. The coroner's only duties at the scene of an accident arise by virtue of holding a governmental position.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.